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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 610

CHARLES W. STRONG, TRADING AS STRONG MANUFACTURING COMPANY,

Petitioner,

vs.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Statute Involved

Internal Revenue Code:

> Sec. 3653. Prohobition of Suits to Restrain Assessment or Collection.
>
> (a) Tax.—Except as provided in sections 272 (a), 871 (a) and 1012 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> (26 U.S.C. 1946 ed., Sec. 3653).

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and The Associate Justices of the Supreme Court of the United States:

Jurisdiction

This is an appeal from a final judgment of the United States Court of Appeals, for the Third Circuit, dismissing the taxpayer's complaint praying that the Collector of Internal Revenue, Philadelphia, Pennsylvania, be restrained from assessing and collecting an alleged income tax deficiency. The judgment of the Court of Appeals was entered January 10th, 1950. Notice of Appeal was filed January 25th, 1950. Jurisdiction is conferred on this Court

by Sections 237 (b) and 240 (a) of the Judicial Code, as amended by the Act of February 13th, 1925; also Act of March 8th, 1934, and Rules of Practice and Procedure.

Questions Presented

1. Does the Complaint state facts sufficient to bring the taxpayer within any exception to the prohibition against suits to enjoin collection of Federal taxes, provided by Section 3653 of the Internal Revenue Code?

2. Can an Affidavit filed in support of a Motion to Dismiss and for Summary Judgment be treated as proof contradictory to well-pleaded facts in the Complaint and uncontradicted testimony adduced at a hearing on the merits?

Statement of Matter Involved

The complaint (R. 2a-4a) alleges that the taxpayer was engaged in business at Philadelphia, Pennsylvania, under the style of Strong Manufacturing Company; that the taxpayer and his wife, Martha H. Strong, were, during 1944, the year here involved, operating Strong Manufacturing Company as partners; that the Commissioner of Internal Revenue declined to recognize the partnership between the taxpayer and his wife as valid, and a revenue agent proposed, as a result of this determination, a deficiency in income taxes against the taxpayer in the amount of $28,086.48; that at the time this deficiency was proposed it was agreed that the resulting overassessment in favor of the taxpayer's wife would be applied to the resulting deficiency against the taxpayer; that, at the time the deficiency was assessed against the taxpayer, he and his wife were living together as man and wife but subsequently they separated and were divorced; that the Commissioner refunded to the taxpayer's wife the sum of $20,279.82, the amount of the resulting overassessment; that to require the

taxpayer to pay the entire amount of the deficiency against him without crediting the overassessment in favor of his wife, refunded to her, will be taking his property without due process of law and that the action of the Commissioner is oppressive, unreasonable and unconscionable.

The Collector moved to dismiss (R. 5a) upon the grounds that the Complaint failed to state a cause of action, and that the District Court was without jurisdiction. An Affidavit, executed by Counsel for the Collector, denying the alleged off-setting agreement of the taxpayer's wife, was filed in support of the Motion to Dismiss and for Summary Judgment (Appellee 10).

Upon hearing the taxpayer's Motion for a Preliminary Injunction the Court (R. 7a-37a) took evidence in support of the allegations of the complaint, and reserved decision as on final hearing (R. 37a) upon the Collector's Motion to Dismiss (R. 29a).

The District Court subsequently entered a minute (R. 38a) that "The Motion must be granted under Section 3653 (a) of the Internal Revenue Code." Judgment accordingly was entered (R. 39a) on February 14th, 1949.

On appeal, the judgment of the District Court was affirmed Per Curiam by the United States Court of Appeals, for the Third Circuit, on January 10th, 1950, and the following Opinion filed of record: "Examination of the Briefs and Record and consideration of the oral argument in this case convince us that no error was committed by the Court below. Accordingly the judgment appealed from will be affirmed."

Argument

Section 3653 (a) of the Internal Revenue Code prohibits suits to restrain assessment or collection of any tax, except as provided in Sections 272 (a), 871 (a) and 1012 (a); and, for purpose of this appeal, it is conceded that the in-

stant fact issue falls outside the pale of any of the stated exceptions.

Despite the prohibition of the Statute, the Courts have created well recognized exceptions in extraordinary circumstances where the legal remedy afforded a taxpayer is clearly inadequate, or the tax partakes of the nature of a penalty. *Mazzella* v. *Yoke,* 70 F. Supp. 463; *Miller* v. *Nut Margarine Co.,* 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422, 1932; *Allens* v. *Regents,* 304 U.S. 439, 58 S. Ct. 980, 82 L. Ed. 1448, 1938.

There is no universal formula for conferring equitable jurisdiction upon the Court in extraordinary circumstances. However, it has been held that the complainant must make out a case of gross and indisputable oppression, without adequate remedy at law. *Concentrate Mfg. Corp.* v. *Higgins,* 2 Cir. 1937, 90 F. 2d 439, certiorari denied 302 U. S. 714, 58 S. Ct. 33, 82 L. Ed. 551.

It is well settled that one taxpayer may consent to have a refund due him applied in satisfaction of the tax liability of another taxpayer. *Klotz et al.* v. *U. S. Court of Claims* (1935), 9 F. Supp. 618. The instant fact issue is whether or not the taxpayer's wife consented to offset a refund due her in satisfaction of a deficiency assessment against the Petitioner.

The record discloses that the complaint and testimony establish the fact issue; and that the only contradiction is an information Affidavit executed by Counsel and filed on behalf of the Collector.

The allegations in the Complaint, as corroborated by the testimony, must be taken as true, for purpose of decision on the Motion to Dismiss. *Midwest Haulers, Inc., et al.* v. *Brady,* 6 Cir. 1942, 128 F. 2d 496. Further, the Affidavit filed in support of the Motion to Dismiss may not be considered as proof contradictory to the facts in the Com-

plaint and the testimony adduced at the preliminary hearing. *Frederick Hart & Co., Inc.* v. *Recordgraph Corporation*, 3 Cir. 1948, 169 F. 2d 580.

The Commissioner's refund to the taxpayer's wife, in derogation of the offsetting agreement, has placed the fund beyond the legal and jurisdictional reach of the taxpayer, and has deprived him of property without due process of law. It therefore follows that to permit the Government to now collect the deficiency assessment from the taxpayer, without any offset, would be oppressive and would result in double taxation.

It is therefore submitted that the Complaint in this case alleges facts bringing the cause of action within the scope of recognized equitable jurisdiction, and the Court below erred in ordering its dismissal.

Respectfully submitted,

FILINDO B. MASINO,
Attorney for Petitioner.

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CITATIONS

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Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 610

CHARLES W. STRONG, TRADING AS STRONG MANUFACTURING COMPANY, PETITIONER

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court delivered no opinion. The *per curiam* opinion of the Court of Appeals (R. 42) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered January 10, 1950. (R. 43.) The petition for writ of certiorari was filed February 15, 1950.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Does the complaint state facts sufficient to bring taxpayer within any exception to the prohibition of Section 3653 of the Internal Revenue Code against suits to enjoin collection of federal taxes?

STATUTE INVOLVED

Internal Revenue Code:

> Sec. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.
>
> (a) Tax.—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.
>
> * * * * *
>
> (26 U.S.C. 1946 ed., Sec. 3653.)

STATEMENT

The complaint (R. 2a-4a) alleges that the taxpayer was engaged in business at Philadelphia, Pennsylvania, under the style of Strong Manufacturing Company; that the taxpayer and his wife, Martha H. Strong, were, during 1944, the year here involved, operating Strong Manufacturing Company as partners; that the Commissioner of Internal Revenue declined to recognize the partnership between the taxpayer and his wife as valid and a revenue agent proposed, as a result of this deter-

mination, a deficiency in income taxes against the taxpayer in the amount of $28,086.48; that at the time this deficiency was proposed it was agreed that the resulting overassessment in favor of the taxpayer's wife would be applied to the resulting deficiency against the taxpayer; that, at the time the deficiency was assessed against the taxpayer, he and his wife were living together as man and wife, but subsequently they separated and were divorced; that the Commissioner refunded to the taxpayer's wife the sum of $20,279.82, the amount of the resulting overassessment; that to require the taxpayer to pay the entire amount of the deficiency against him without crediting the overassessment in favor of his wife, refunded to her, will be taking his property without due process of law and that the action of the Commissioner is oppressive, unreasonable and unconscionable. (Pet. 2-3.)

Upon these allegations, taxpayer prayed for judgment enjoining the Collector from collecting the deficiency assessed against him and ordering the Collector to credit the taxpayer with the amount refunded to his wife. (R. 4a.)

The Collector moved to dismiss (R. 5a) upon the grounds that the complaint failed to state a cause of action and that the District Court was without jurisdiction.

Upon hearing the taxpayer's motion for a preliminary injunction, the District Court (R. 7a-37a) took evidence in support of the allegations of the

complaint and reserved decision as on final hearing (R. 37a) upon the Collector's renewed motion to dismiss (R. 29a). The Court subsequently entered an order *sur* motion to dismiss (R. 38a) that "The motion must be granted under Section 3653 (a) of the Internal Revenue Code." Judgment, accordingly, was entered for the respondent on February 14, 1949 (R. 39a), and the court below affirmed (R. 42).

ARGUMENT

There is no occasion for further review of this case.

Even assuming the truth of the allegations of the complaint, the District Court determined that it had no jurisdiction in the case because of the provisions of Section 3653 of the Internal Revenue Code. The plaintiff does not purport to be within any of the specific exceptions to the section, which relate solely to the time within which the Commissioner may make assessments of deficiencies and commence distraints or proceedings in court to collect them. Otherwise, exception to the statute has been made only in those rare cases where, in addition to the illegality of the tax, exceptional and extraordinary circumstances were thought to exist. *Miller* v. *Nut Margarine Co.,* 284 U. S. 498; *Allen* v. *Regents,* 304 U. S. 439. Apart from the question whether any such exception is warranted in the light of the plain statutory language, com-

plainant, in order to come within such exception, must make out a case of gross and indisputable oppression, without adequate remedy at law. *Concentrate Mfg. Corp.* v. *Higgins,* 90 F. 2d 439 (C.A. 2d), certiorari denied, 302 U. S. 714. This has not been done herein. Taxpayer concedes that he owes the tax. (R. 2a.) He has made no attempt to show that to pay the tax complained of and to file a claim for refund, as provided by law, would not be an adequate remedy.

Furthermore, taxpayer's sole objection to the procedure followed by the Commissioner is that the overassessment in favor of his wife produced by the Commissioner's refusal to give effect for income tax purposes to the alleged partnership between him and his wife should have been applied to the payment of the resulting deficiency against him. But, although he alleges that a revenue agent accepted his offset, taxpayer does not allege that his wife acceded to such an agreement. An affidavit filed by Government counsel states that no such agreement by the wife is in the files of the Bureau of Internal Revenue, although other agreements of taxpayer and his wife were to be found there. Such an affidavit is proper on motion to dismiss. *Farrall* v. *District of Columbia Amateur Ath. Union,* 153 F. 2d 647 (C.A. D.C.). In the circumstances of this case, the Commissioner had no alternative but to refund to taxpayer's wife the taxes improperly collected from her.

At the hearing taxpayer adduced testimony of his accountant and himself tending to support the allegation that an agreement was reached between taxpayer and the revenue agent. (R. 7a-16a, 17a-29a.) But the only evidence taxpayer adduced to show that his wife had signed an agreement was his own self-serving, inconclusive, and self-contradictory statements. (R. 21a, 26a-29a.) The trial court was not bound to accept taxpayer's assertion that his wife had signed an agreement. *Quock Ting* v. *United States,* 140 U. S. 417. It is plain that the District Court could find no evidence of such an agreement. (R. 34a-35a.)

CONCLUSION

The decision below was clearly correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH, 1950.

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